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No. 85-1858

In the Supreme Court of the United States

October Term, 1985

JOHN JACKSON,
Petitioner,

vs.

PEPSI-COLA BOTTLERS OF TOLEDO, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals misapply the "clearly erroneous" standard in reviewing the decision of the trial court?

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STATEMENT OF THE CASE

This action was originally commenced by a complaint, filed by petitioner, John Jackson, in the United States District Court for the Northern District of Ohio, Western Division, on November 15, 1978, alleging race-related employment discrimination (denial of promotion) in violation of 42 U.S.C. §§1981 and 1988. An answer was filed by respondent, RKO Bottlers of Toledo, Inc., on December 6, 1978, denying that it had discriminated against petitioner. On September 5, 1980, the District Court granted petitioner's motion to amend his complaint, by interlineation, to add an allegation of violation of 42 U.S.C.

§2000(e) *et seq.* as an additional basis of jurisdiction, as well as adding the fact that he had filed a complaint with the Equal Employment Opportunity Commission and had received a "right to sue letter".

On June 26, 1981, petitioner moved for leave to file an amended complaint in order to allege retaliation and to bring the suit as a class action. The District Court, on January 15, 1982, issued a memorandum and order denying petitioner leave to amend the complaint to bring the cause as a class action. The Court sustained the motion to state a claim under 42 U.S.C. §2000(e)-(3)(a). An amended complaint was filed on January 21, 1982, and was answered on February 1, 1982.

Respondent moved, on August 9, 1982, to dismiss the claim of retaliation on the grounds that no right to sue letter had been received. Petitioner then moved for leave to file an amended complaint, alleging that a right to sue letter had been received from the Equal Employment Opportunity Commission. The District Court, on September 3, 1982, found respondent's motion to dismiss to be moot.

The third amended complaint was filed by petitioner on September 1, 1982, and an answer was filed by respondent on September 13, 1982. A trial to the court commenced on September 28, 1982, and continued on September 29 and 30, October 1, 5, 6, and October 13, 14, and 15, 1982, with sixteen witnesses giving extensive testimony. Proposed findings of fact and conclusions of law were filed by both parties, and, on November 15, 1982, the District Court entered judgment in favor of respondent, finding that petitioner had not been denied a promotion due to his race or discharged from his employment in retaliation for having filed charges of race discrimination.

Petitioner appealed the decision of the District Court and the issues were briefed and argued before the United States Court of Appeals for the Sixth Circuit. That Court issued an opinion, on August 30, 1984, reversing the judgment of the District Court and remanding for further proceedings. The Court of Appeals found that the District Court had committed error on the issue of whether the petitioner had presented prima facie evidence of discrimination and retaliation. The Appellate Court could not judge, from the District Court's opinion, whether the inferences that can be drawn from a prima facie case had been properly considered at the next stage of the process. *Jackson v. RKO Bottlers of Toledo,* 743 F.2d 370, 377, 378 (6th Cir., 1984); Petitioner's Appendix (hereinafter referred to as App.), A49.

Following remand to the District Court, petitioner moved for a new trial and reassignment to a different judge, and, in the alternative, requested leave to submit newly-discovered evidence. The motion was opposed by respondent and the District Court denied the motion, by order dated February 5, 1985. The Court stated that it would be able to fairly review the trial record and found that the evidence which petitioner sought to introduce was not sufficiently probative to warrant the reopening of the case. App., A36-37.

Proposed findings of fact and conclusions of law were submitted by both parties to the District Court which ruled, on February 27, 1985, that judgment would be entered in favor of respondent. Petitioner, on March 18, 1985, again appealed the decision of the District Court to the Sixth Circuit Court of Appeals. The issues were briefed and argued and the Court of Appeals issued an opinion, on February 10, 1986, affirming the decision of the District Court in favor of respondent. The Court

of Appeals found that, despite petitioner's having shown a prima facie case on both the promotion and retaliation issues, the District Court's findings that the respondent had shown legitimate, non-pretextual reasons on both issues, which had not been rebutted, were not clearly erroneous. *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 51-52 (6th Cir., 1986); App., A1, A3. This petition followed.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 52(a) IN CONSIDERING AND AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Petitioner alleges that the Sixth Circuit Court of Appeals misapplied the "clearly erroneous" standard in its second decision on this case, *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50 (6th Cir., 1986); App., A1, because the Court, in "reviewing the same facts and result which it had earlier determined were 'clearly erroneous', subsequently found both the [District] Court's characterization and decision appropriate to affirm." Petitioner's Brief, p. 4. This argument is incorrect because the issues reached by the Court of Appeals in the first decision, *Jackson v. RKO Bottlers of Toledo*, 743 F.2d 370 (6th Cir., 1984); App., A38, were different from those decided in the aforementioned, subsequent decision.

It is well established that there is an accepted pattern for the allocation of proof in employment discrimination and retaliation cases. According to *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the complainant has the initial burden of establishing a prima facie case of discrimination, and he must establish, by a preponderance of the evidence, facts, that if not explained, prove or give rise to an inference of unlawful discrimination. If the complainant successfully establishes a prima facie case, the burden is then upon the defendant to articulate some legitimate nondiscriminatory reason for its actions. *McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 802; *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981); *Albemarle Paper Company v. Moody,* 422 U.S. 405 (1974). If the defendant articulates such a reason, plaintiff may then only prevail by showing that the nondiscriminatory reason articulated was a mere pretext for the discriminatory action. Although the burden of going forward with the evidence may shift between the plaintiff and the defendant, the burden of persuasion always remains on the plaintiff. *Jackson v. RKO Bottlers of Toledo, supra,* 743 F.2d at 375; App., A45; *Haynes v. Miller,* 669 F.2d 1125, 1126 (6th Cir., 1982). Addressing the issue of retaliation, to support a claim of retaliatory discharge, plaintiff must establish: (1) that he opposed practices made unlawful by Title VII; (2) this activity was statutorily protected; (3) that he was the subject of adverse employment action; and (4) that there exists a causal link between this protected activity and the adverse action of his employer. *See, Jackson v. RKO Bottlers of Toledo, supra,* 743 F.2d at 375; App., A46. As to the latter requirement, the Court must consider whether the discharge would have occurred anyway had there been no protected activity, which is commonly referred to as the

"but for" test. *Mount Healthy City School District Board of Education v. Dole*, 429 U.S. 274 (1977); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). This issue, just as in the discrimination issue, turns on whether the employer annunciates a legitimate business reason for terminating the employee and whether the plaintiff is able to show that the annunciated reason was merely pretextual.

The Court of Appeals, in its first decision dealt with only one-half of each equation. The Court found that the District Court had committed error on the issue of whether the plaintiff had presented prima facie evidence of discrimination and retaliation. The Court of Appeals, however, could not judge, from the District Court's opinion, whether the inferences that can be drawn from a prima facie case had been properly considered at the next stage of the process, that is, whether the employer annunciated legitimate reasons for its action which were not pretextual. *Jackson v. RKO Bottlers of Toledo, supra*, 743 F.2d at 377, 378; App., A51-52. The Court of Appeals stated that:

> "[T]he district court failed to recognize that Jackson had made a prima facie case, with respect to both his Title VII claims and §1981 claim. This distorted its fact-finding process in determining whether the defendant articulated a non-discriminatory reason sufficient to rebut the inference of discriminatory intent the plaintiff had established." *Jackson v. RKO Bottlers of Toledo, supra*, 743 F.2d at 379; App., A55.

The Court also stated that:

> "We cannot be assured that the plaintiff's attempt to demonstrate pretext was fairly considered when the trial court did not acknowledge plaintiff's prima facie

> case of retaliatory discharge. The plaintiff may have lost his case at trial because the district court erred in failing to recognize his prima facie case." *Jackson v. RKO Bottlers of Toledo, supra,* 743 F.2d at 378; App., A52.

The Court of Appeals, citing *Pullman-Standard v. Swint,* 456 U.S. 273 (1982), remanded the case to the District Court for consideration of these issues, in light of the conclusion that plaintiff had established a prima facie case. It bears repeating that the Court of Appeals itself did not reach the next level of consideration.

The District Court, having pointed out that it had "heard extensive testimony over the course of the nine day trial", App., A32, declared that it could fairly review the trial record in light of the Court of Appeals' decision. App., A36. The District Court proceeded to re-examine the record and ruled in favor of respondent. The Court stated that:

> "Plaintiff satisfied his burden of presenting a prima facie case of discrimination in defendant's decision to not promote him to the position of plant superintendent. The defendant has articulated legitimate non-discriminatory reasons for his rejection, thus rebutting plaintiff's prima facie case. Plaintiff has failed to prove, by a preponderance of the evidence, that the reasons articulated by defendant were pretextual. Defendant's decision . . . was not based in any degree upon plaintiff's race . . . ." App., A29.

The Court, on the retaliation issue, stated that:

> "Plaintiff alleged that his discharge from employment with defendant was in retaliation for his having filed this action and/or a discrimination charge. Plaintiff

established a prima facie case of retaliation. Defendant articulated a legitimate nondiscriminatory reason for the discharge, to wit: that plaintiff had engaged in conduct unacceptable for a supervisor after having been previously warned concerning such conduct prior to his having filed discrimination charges. Plaintiff remained in the second highest plant position for more than two years and four months prior to the incident which led to termination. The court is not persuaded by plaintiff's testimony that he was the victim of disparate treatment during that lengthy period. Neither plaintiff's lawsuit nor his charge of discrimination played any part, nor were they substantial or principal factors, in his discharge. Plaintiff would have been discharged regardless of the charges filed with the governmental agencies or this court." App., A29.

The Court of Appeals, now being satisfied that the District Court had applied the correct standard and that petitioner had been given the benefit of the inferences raised by showing a prima facie case, found that the District Court's findings of fact, at the second level of consideration, were not clearly erroneous. The Court stated, on the promotion issue, that:

> "Plaintiff failed to prove that the reasons articulated by defendant were pretextual." *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co., supra,* 783 F.2d at 54; App., A8.

As to the retaliation issue, the Court stated:

> "Plaintiff has failed to produce any credible evidence that this legitimate reason for his termination was mere pretext." *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co., supra,* 783 F.2d at 54; App., A9.

The Court of Appeals obviously recognized that the evidence, upon which the resolution of the issues had to be founded, was testimonial in nature, the District Court having heard and observed some sixteen witnesses, and the Court was unable to state that the District Court's decisions, in weighing that testimony and judging the credibility and demeanor of the witnesses, was clearly erroneous.

Petitioner cites this Court's decision in *Anderson v. Bessemer City,* ..... U.S. ....., 53 U.S.L.W. 4314 (March 19, 1985), as providing support for their position that the Sixth Circuit did not correctly apply the clearly erroneous standard. We are unable to discern such support from that opinion and, indeed, we believe that the Court of Appeals' decision is in complete agreement with that case. This Court stated, in that decision, that:

> "Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles . . . is that 'a finding is' clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there

are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. . . .

. . . Rule 52 . . . states straightforwardly that 'findings of fact shall not be set aside unless clearly erroneous.' That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.'. . .

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. . . . In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . . For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations and demeanor and tone of voice that bears so heavily on the listener's understanding of and belief in what is said. . . . [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two

> or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. Bessemer City,* ..... U.S. ....., 53 U.S.L.W. 4314, 4317 (March 19, 1985). (citations omitted).

We respectfully suggest that the Court of Appeals precisely followed the foregoing precepts. Here, despite the District Court's error on the prima facie issue, the factual inquiry proceeded to "a new level of specificity", *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715 (1983), and the Court of Appeals, having reviewed the record, was unable to find basis for concluding that the District Court's findings were clearly erroneous. The standard was properly applied, and the Court of Appeals was correct in giving the appropriate deference to the trier of fact.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari. The clearly erroneous standard was applied in conformity with the decisions of this Court and the decision of the District Court and the Court of Appeals should be allowed to stand.

Respectfully submitted,

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